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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 199

AMERICAN UNION TRANSPORT, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA
and
FEDERAL MARITIME BOARD,
Respondents,

RIVER PLACE & BRAZIL CONFERENCES,
(and the member lines thereof),
Intervener-Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF OF INTERVENER-RESPONDENTS IN OPPOSITION.

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BRIEF OF INTERVENER-RESPONDENTS IN OPPOSITION.

Intervener-respondents, River Plate and Brazil Conferences, *et al.* submit this brief in opposition to the granting of a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, to review the final judgment of that Court entered on April 24, 1958 in the above entitled action.

Opinions Below and Jurisdiction.

The opinions below and jurisdictional requisites are adequately set forth in the petition.

Questions Presented.

At a pre-hearing conference before the Court of Appeals for the District of Columbia, the parties to this litigation agreed that the following questions were issues in this case:

1. Was the Board's ruling that the payment of brokerage to petitioner would result in an indirect rebate to the consignee of the cargo in violation of section 16 of the Shipping Act, erroneous either as a matter of substitutive or procedural law?

2. Where petitioner has performed freight forwarding services for a consignee free of charge, may it lawfully collect a brokerage fee from the carrier for any services performed by petitioner in connection with such forwarding?

3. (a) Did the Board have jurisdiction to decide whether brokerage was earned by petitioner?

(b) If so, did the Board err in holding that brokerage had not been earned?

Just as before the Court below the issue before this Court would be the validity of an order of the Federal Maritime Board denying reparation because the brokerage being claimed by American Union Transport, Inc. (sometimes referred to as AUT) was not earned and because such payment would result in an indirect rebate to the consignee in violation of section 16 of the Shipping Act, 1916.

Statutes Involved.

As set forth in the petition, sections 15, 16 and 22 of the Shipping Act, 1916 (46 U. S. C. 814, 815, 821), are the statutes involved in this proceeding.

Statement of the Case.

The petitioner, AUT, engages in various businesses. It owns steamships, charters vessels, acts as a water carrier, is a freight forwarder registered with the Board and acts as a broker in some transactions (R. 27, 93-94). Intervener-respondent, the River Plate and Brazil Conferences and the member lines,[1] were respondents in the proceeding before the Board and the parties from which AUT seeks reparation. The Conference is a group of steamship line common carriers operating between certain ports of the United States and Canada and ports in Brazil, Uruguay, Paraguay, and Argentina (R. 43). The Conference operates under an agreement which has been approved pursuant to

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[1] The members of the River Plate and Brazil Conferences which have intervened in this action are: The Booth Steamship Company, Limited, Rederiaktiebolaget Disa, Dederiaktiebolaget Poseidon, Angfartygsaaktiebolaget Tirfing, Cia. Argentina de Navegacion Dodero, S. A., Dampskibsselskabet Torm, Flota Mercante del Estado, N. V. Nederlandsch-Amerikaansche Stoomvaart-Maatschappij "Holland-Amerika Lijn", Van Nievelt, Goudriaan & Co's. Stoomvaart-Maatschappij N. V., A/S Lise, Aktieselskapte Ivarans Rederi, Skibsaktieselskapet Igadi, Lamport & Holt Line, Ltd., Lloyd Brasileiro (Patrimonio Nacional), Mississippi Shipping Company, Inc., Moore-McCormack Lines, Inc., The Northern Pan-American Line, A/S, Rederiaktiebolaget Svenska Lloyd, Stockholm Rederiaktiebolaget Svea, Rederiaktiebolaget Fredrika, A/S J. Ludwig Mowinckels Rederi, and Westfal-Larsen & Co., A/S.

The foregoing intervener-respondents are all of the respondents in the proceeding before the Federal Maritime Board, except International Freighting Corporation, Inc. and A. S. Besco, which are no longer members of the Conference.

the terms of section 16 of the Shipping Act, 1916 (R. 3-4). This agreement provides in part as follows:

> "4. No freight brokerage shall be paid in excess of one and one quarter percent (1¼%) on the amount of freight paid in accordance with the tariff.
>
> * * * * * * *
>
> "7. The members of each Conference * * * shall, at any meeting of the Conference consider and pass upon ordinary routine business of the Conference, and upon any matter involving discriminations, tariffs, freights, commissions, brokerages * * * governing south bound transportation * * *".

The freight tariff issued pursuant to the basic conference agreement provides as follows:

> "Brokerage
>
> Freight brokerage * * * may be allowed only to bona fide brokers whose actual business shall be brokerage and freight between ocean carriers and the general shipping public".

In the early part of 1952 Estrado de Ferro Central do Brasil (hereinafter referred to as the Central or Central Railroad) a part of the Ministry of Transportation of the Department of Public Works of the Brazilian Government purchased 120 railroad locomotives and spare parts from certain American and Canadian Companies. The Conference learned of the shipment to be made of the 120 locomotives and parts and instructed their representative in Brazil to negotiate directly with the Central Railroad on the question of rates in an endeavor to secure the business. The Conference was successful in obtaining the business over the competition offered by AUT, who also attempted to obtain the business as a carrier.

By letter dated May 16, 1952, Central advised AUT that it had decided to entrust the ocean transportation of the 120 locomotives to Lloyd Brasileiro, a member of the Conference and also an instrumentality of the Brazilian government, at prices quoted by the Conference. In addition the letter purported to appoint AUT broker in connection with the shipments by Lloyd Brasileiro or another member of the Conference, without any charge to Central for services rendered to it by AUT (R. 155).

The first locomotives to be shipped were carried by vessels of Lloyd Brasileiro. By letter dated June 11, 1952 AUT notified Lloyd Brasileiro that brokerage would be due from it at the rate of 1¼% on the two locomotives being shipped. Lloyd Brasileiro immediately replied by letter on June 12, 1952, advising that it would not pay brokerage on any of the shipment because both the Central Railroad of Brazil and Lloyd Brasileiro were Departments of the Ministry of Transportation of the Brazilian Government and Lloyd was not permitted to pay brokerage on such shipment in view of the fact that Lloyd would normally handle such shipments in any event (R. 164).

The Conference at a meeting on June 12, 1952, considered the question of whether or not brokerage should be paid on the freight for the locomotives in view of the fact that AUT had competed with the Conference for the business and the business was obtained by the Conference lines directly from the Central Railroad. The Conference lines at that meeting determine that no brokerage should be paid to AUT on the freight paid for the shipments of these locomotives (R. 208, 209).

This action of the Conference was not submitted to the Federal Maritime Board for its approval under section 15 of the Shipping Act, but the minutes of the meeting at which this action was taken were filed with the Board in

accordance with the usual Conference procedure (R. 210). The Conference lines considered that the Conference agreement permitting them to pass upon "any matter involving * * * brokerages * * *" provided the necessary authority for their decision without requiring such action to be separately submitted to the Federal Maritime Board for approval.

Shortly after the Conference action was taken, AUT learned of the Conference position. Nevertheless, AUT continued to render services as a freight forwarder in connection with the shipments. It did so because of its undertaking to handle these shipments on behalf of the Central Railroad even though it knew the Conference lines would refuse to pay brokerage (R. 111).

ARGUMENT

CERTIORARI SHOULD BE DENIED IN THIS CASE FOR THE FOLLOWING REASONS:

I.

THERE IS NO CONFLICT OF DECISION

American Union Transport asserts, as a ground for the granting of ceriorari in this case, that the decision of the Court of Appeals is in conflict with the decision of this Court, in *Federal Maritime Board* v. *Isbrandtsen Co.*, 78 S. Ct. 851. Reliance is placed on the language in the Court's decision pointing out that section 14 of the Shipping Act prohibits "practices of conferences which have the purpose and effect of stifling the competition of independent carriers."

In the *Isbrandtsen* case, *supra,* this Court held that inasmuch as the Federal Maritime Board had determined that the dual-rate contract of the Conference was "a necessary competitive measure * * * to meet the competition of

Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade" such contract constituted a "'resort to other discriminating or unfair methods' to stifle outside competition in violation of Section 14 Third."

Petitioner at page 3 specifically sets forth the statutes involved in this case and refers only to Sections 15, 16 and 22 of the Shipping Act, 1916. There is no question that Section 14 is not involved in this case. The Court's decision in the *Isbrandtsen* case, *supra*, was based upon an interpretation of Section 14, Third of the Shipping Act, 1916. In the instant case AUT sought relief as a broker and not as a steamship carrier (Complaint R. 2742). Thus this Court's decision in the *Isbrandtsen* case, *supra*, has no application to this case.

II.

The Decision Below is Clearly Correct

A. The payment of so-called brokerage under the circumstances of this case would have violated Section 16 of the Shipping Act, 1916.

It was specifically admitted by the President of American Union Transport, in his testimony in this case before the Examiner, that American Union Transport waived the collection of any forwarding fee from the Central Railroad of Brazil and sought to be compensated for its services rendered to the Central Railroad by collecting brokerage from the steamship lines who carried the locomotives. Mr. Holzer testified as follows (R. 97, 98):

> "Q. (Mr. Maddy) Mr. Holzer, in connection with these 120 locomotives, did you charge the Central Railroad of Brazil a forwarding fee? A. We did not.

"Q. Why didn't you charge them a forwarding fee?

* * * * * *

A. (Mr. Holzer) Well, there are two reasons for it: the principal reason is that we rarely, if ever, have charged a handling fee on shipments that were entrusted to us by any Government agency, be it this one or any other foreign or United States Government agency. U. S. Government shipments entrusted to forwarders are always free of forwarding fees, or usually are.

"The second reason is that we would have had to have an understanding with the principal as to such a charge, which we did not have.

"Q. What was your understanding with your principal in that regard? A. We were not to charge any fee. We had an understanding to that effect.

"Q. You had that explicit understanding? A. That is right.

"Q. Weren't you performing a service for Central in connection with forwarding these locomotives? A. Yes.

"Q. Yet you did not charge them for it? A. No, we did not.

"Q. Now, how did you expect to be compensated for this service which you rendered to the Central Railroad? A. By the brokerage from the lines."

Based upon the admitted waiving of the forwarding fee, the Federal Maritime Board found that "AUT performed freight forwarding services for the consignee without compensation therefor and relied upon brokerage from the carriers for its full compensation" and that "under this arrangement the consignee was to have property transported at less than the rate of the transportation therefor, together with the cost of the incidental services in connection therewith" (R. 11).

According to the Board this was "the evil which Congress had in mind when it stated that it shall be 'unlawful for any * * * consignee, forwarder, broker, * * * knowingly and wilfully, directly or indirectly, * * * by an * * * unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than rates or charges which would otherwise be applicable'." (R. 11). The Board held that it would not order brokerage paid in any event because "the waiving of a freight forwarding fee from the consignee and the collection thereof from the carrier under the guise of brokerage would be an indirect rebate to he consignee to the extent that the brokerage payment included the cost of the freight forwarding services and therefore an 'unjust or unfair device or means'." Under the circumstances therefore the Board found that the awarding of reparation in the form of brokerage would be in violation of Section 16 of the Shipping Act, 1916.

The Court of Appeals affirmed the decision of the Federal Maritime Board on this point, as well as on other grounds. The Court of Appeals held that, "in this case, however, except in a few minor details, the services rendered inured not to the benefit of the carrier but to the benefit of the consignee, and, to that extent the Board was correct in holding that the consignee benefited and that a rebate in effect resulted". (Pet. App. A, 9). The Court further held that "the conclusions of the Board in this case are reconcilable with the statutory directions" and "that the Board should have authority to distinguish between the services of a broker and those of a freight forwarder" (Pet. App. A. 11, 12) and found that under the circumstances in this case, Section 16 would have been violated had reparation been awarded.

AUT contends that the Board's reasoning was wrong as well as that of the Court below. Apparently, although

it is not entirely clear, it contends that the Board lacks jurisdiction to determine that reparation should not be awarded AUT because AUT's conduct was not knowing and wilful within the meaning of Section 16 of the Shipping Act.

The acts of AUT in this case were knowing and wilful. It deliberately sought payment for services rendered the Central Railroad from the steamship carriers. In addition on each of the brokerage bills AUT made the following certification:

> "In compliance with Section 16 of the Shipping Act, 1916, payment by the carrier and acceptance of freight brokerage by the broker are on the strict understanding that no part of the brokerage shall revert to the shipper or consignee * * *". (R. 177-179).

AUT presented brokerage bills for payment to the various carriers having the above certification on them even though the consignee, the Central Railroad of Brazil, would be thus obtaining the benefit of at least part of the brokerage inasmuch as AUT planned to obtain payment for its forwarding services in this manner. By this certification AUT deliberately misrepresented the facts to the steamship carriers. Such conduct was certainly knowing and wilful.

The proper meaning of the words "knowingly and wilfully" in Section 16 of the Shipping Act is set forth in the decision of the Federal Maritime Board in *Misclassification of Tissue Paper*, 4 F. M. B. 483.

> "We believe, following the authority cited by Public Counsel, the phrase 'knowingly and wilfully' means purposely or obstinately or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements.

> We agree a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper forwarder was acting knowingly and wilfully in violation of the Act. Diligent inquiry must be exercised by shippers and forwarders in order to measure up to standards set up by the Act. Indifference on the part of such persons is tantamount to outright active violation."

AUT certainly knew what it was doing. There was no question of lack of knowledge. Its acts were "knowingly and wilfully" done.

Petitioner cites the decision of the Board in *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 3 F. M. B. 556, which concerned an interpretation of Section 16, Second, of the Shipping Act, 1916. This section applies to steamship carriers and is not applicable to brokers or forwarders.

The Board found AUT's conduct violated the first paragraph of Section 16 which provides "that it shall be unlawful for any * * * consignee, forwarder, broker, * * * knowlingly and wilfully, directly or indirectly, * * * by any * * * unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable". In 1936 this language was added to Section 16 of the Shipping Act to make illegal specified practices engaged in by shippers, consignees, consignors, forwarders and brokers. (H. R. Report No. 2598 to accompany S-3467, 74 Cong. 2d Sess.) The language of this paragraph is broader than that of Section 16, Second, because attempting, as well as obtaining, by indirect as well as direct means, transportation of property by unfair device or means at less than the rates or charges which would otherwise be applicable is illegal. Petitioner's contention that this language was not intended by Congress to interfere with the right to "legiti-

mate brokerage" does not support petitioner's position since the brokerage being sought would not be legitimate because payment would constitute an indirect rebate in violation of the Act.

B. The Federal Maritime Board Was Correct in Holding That Petitioner Had Not Earned Brokerage.

It stands admitted that American Union Transport attempted to obtain the business of carrying these locomotives to Brazil and when it was unsuccessful in doing so, induced the Central Railroad to appoint it freight forwarder for the shipments. (R. 95, R. 154, R. 155). Thus the Conference lines had already secured the business by the time AUT sought to enter the transaction as a broker. As the Court of Appeals said:

> "It is perfectly obvious that AUT performed no services as a broker in the ordinary sense of the term 'broker', i.e., securing cargo. Far from obtaining the cargo for the Conference, AUT was in direct conflict with the Conference, and under no stretch of the imagination could it be said that AUT earned any compensation whatsoever as a broker.
>
> * * * * * *
>
> "It seems clear, as the Board held, that the other functions performed by AUT could not be said to be functions which, in the absence of AUT's performing them, would be performed by the carriers and that the duty to bring the locomotives alongside the vessel ready for shipment is a duty of the shipper, not of the ship, and was ordinary freight forwarder service.
>
> * * * * * *
>
> "The appointment of AUT as a broker by Central could not create any liability on the part of the

> ocean carriers. There was no agreement by the carriers authorizing the appointment, and certainly no agreement by the members of the Conference to incur liability to AUT, with whom it had engaged in competition for the very business for which it now claims compensation by way of reparation. AUT was not the broker for the carriers to obtain the contract and there was no agreement at any time between AUT and the members of the Conference to pay brokerage. Everything is to the contrary and AUT was promptly put on notice that the carriers would not pay. Nevertheless, having this notice, AUT elected to proceed. It did so at its own risk. It seems clear also that the selection of the carriers was made by Central and not AUT, as Central reserved the right to designate the carrier".

The Federal Maritime Board and its predecessors have always recognized the right of individual steamship lines to make their own determination as to whether they would pay brokerage. This principle was set forth in *Agreements and Practices re Brokerage;* 3 U. S. M. C. 170, in the following language:

> "Nothing herein is to be construed as a directive that individual carriers must pay brokerage nor as any limitation as to the amount of brokerage that may be paid by such individual carriers, provided the payments do not result in violations of applicable statutes. *A carrier should be free within limits to pay brokerage or not as its individual managerial discretion dictates.*" (Emphasis added).

Lloyd Brasileiro individually determined not to pay brokerage to AUT and Lloyd carried most of the locomotives. The Conference agreement and tariff rule permit member lines to pay brokerage when earned at their discretion and the payment of brokerage is not mandatory. In

fact $7,330.41 of the $11,647.12 being sought by petitioner is the brokerage on shipments carried by Lloyd Brasileiro.

By letter on June 11, 1952, AUT notified Lloyd Brasileiro that the first two locomotives would be ready to be shipped, and notified the steamship company that it expected to be paid brokerage at the rate of 1¼% of the freight (R. 162, 163). Lloyd Brasileiro immediately replied that brokerage would not be paid because both Lloyd Brasileiro and the Central Railroad of Brazil were departments of the Government of Brazil and not permitted to pay brokerage on these shipments consigned to a Brazilian Government department. (R. 115-118). This action of Lloyd Brasileiro was taken prior to and independent of the Conference action determining not to pay brokerage and, as the Court of Appeals said, "there is no evidence justifying the claim that Lloyd as a matter of fact took this action as a result of the June 12, 1952 meeting. In fact the evidence is to the contrary."

Under Section 22 of the Shipping Act, the section under which AUT seeks reparation, there must be a showing of actual injury as a result of a violation of the Shipping Act before the Board can properly award reparation. The Federal Maritime Board and its predecessor have consistently refused to award reparation where there was no actual showing of injury, even though a violation of the Shipping Act has been established. *Sun Maid Raisin Growers Association v. Blue Star Line Ltd.*, 2 U. S. M. C. 31, 38; *J. G. Boswell Co. v. American Hawaiian S. S. Co.*, 2 U. S. M. C. 95, 104, 105.

The interpretation placed on the Shipping Act, 1916, by the Federal Maritime Board is in accord with the interpretation placed upon the reparation section of the Interstate Commerce Act by this Court in *Keogh v. C. & N. W. Ry. Co.*, 260 U. S. 156, 165. In that case it was held that under

Section 8 of the Interstate Commerce Act, before reparation could be awarded, it was necessary to establish that as a result of the carrier's act "damages in some amount susceptible of expression in figures resulted".

Before recovery can be had by AUT, it must show that it was deprived of something that to which it had a legal right. In its decision the Court of Appeals said "injury must be shown before recovery can be had; AUT having had no right to brokerage, suffered no damage by the action complained of".

C. The Board's Decision Was Procedurally Correct

AUT argues that the Board denied it a hearing on the issue of the legality of its contract. Petitioner in this case sought reparation under Section 22 of the Shipping Act, 1916. The Federal Maritime Board has no jurisdiction to award reparation if in so doing violation of another provision of the Act would result. The Board in its decision stated that "even if brokerage was otherwise recoverable we would not order it paid where such payment would countenance a violation of Section 16 of the Act and thus be illegal". (R. 12). The Court of Appeals affirmed the Board's decision in the following language:

> "We are of the opinion also that there is no merit in appellant's claim that the Board's decision and order are procedurally invalid. If the Board held, as it did, that the collection of brokerage, so-called, under the circumstances of this case, would violate Section 16, the Board would not be precluded from disallowing compensation for an illegal act, whether the question was specifically raised or not. In addition, we are unable to say that the issue in question was not called to the attention of the Board."

Section 22 of the Shipping Act provides that "if the complaint is not satisfied the Board shall, except as otherwise provided in this Act, investigate it in such manner by such means, and make such order as it deems proper." Under this section the Board's authority to act is expressly made dependent upon the other provisions of the Shipping Act. Further Section 22 provides "the Board, upon its own motion, may in like manner and, except as to orders for the payment of money, with the same powers, investigate any violations of this Act." This latter part of Section 22 specifically provides that the Board, on its own motion may investigate any violations of the Act. It is anomalous for petitioner to suggest that the Board is estopped from considering whether its conduct met the standards set forth in other sections of the Shipping Act when petitioner seeks to have the Board exercise its jurisdiction and award it relief under the Shipping Act. It is familiar law that a court or an administrative body can at any time examine into the question of lack of jurisdiction even though the parties may not have formally raised the question.

AUT's argument appears to be that because the Conference did not affirmatively allege in its answer in the proceedings before the Federal Maritime Board, that the payment of brokerage in this case would constitute a violation of the Shipping Act, the Board had no right to make such a decision. There is no doubt, however, that it was apparent to the petitioner that this issue was involved in the proceedings. For example, in the Demand for a Bill of Particulars directed to AUT by the Conference, the question was asked whether AUT had waived the collection of a forwarding fee from the consignee and this question was answered by AUT in the affirmative. Again during the hearing before the Examiner the president of AUT on

cross examination was asked whether AUT had waived a forwarding fee and sought to be compensated for its services by the steamship lines (R. 97, 98). In connection with the submission of proposed findings of fact and conclusion of law to the Examiner, the Conference pointed out that if the Board were to award reparation to AUT, it would result in violation of section 16 of the Shipping Act (R. 213-216). Following rendition of the Examiner's report, the Conference filed exceptions thereto and pointed out what the legal effect of waiving of the forwarding fee in this case was (R. 217-219). AUT in its reply to the exceptions filed by the Conference, discussed this point (R. 221). In oral argument before the Federal Maritime Board, on exceptions to the Examiner's report, the issue concerning the waiving of the forwarding fee and its legal implications, was discussed (R. 222-224). There is no question but what AUT waived the collection of a forwarding fee and sought to be paid for the services rendered to the consignee by collecting brokerage from the steamship lines. AUT has had ample opportunity to argue what the legal effect of these facts were. Thus under the circumstances there is no question that AUT has not been denied a hearing on the issue of illegality despite its protestations to the contrary.

Petitioner's contention that the Board engaged in retroactive rule making loses sight of the nature of this case. The Federal Maritime Board was not engaged in rule making as petitioner contends, but found it necessary to interpret the Shipping Act in order to pass on petitioner's claim for reparation. Although the question of whether brokerage could be collected when a forwarding fee has been waived had not previously been determined by the Board, there is nothing uncommon in a court decision for example, having future effect. Petitioner's contention that the Board's decision in *Agreements and Practices re Broker-*

age, 3 U. S. M. C. 170 is to the contrary is incorrect. The issue was not passed on in that proceeding. The mere fact that an adjudication by the Federal Maritime Board involved an interpretation of the Shipping Act does not change the nature of the proceeding from an adjudication to that of rule makihg under the Administrative Procedure Act (5 U. S. C. 1001 etc.).

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 8, 1958.